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HAROLD B. WILLEY

No. 631

IN THE

Supreme Court of the United States

October Term, 1954

CONSOLIDATED FREIGHTWAYS, INC., a corporation,
Petitioner,
vs.
UNITED TRUCK LINES, INC., a corporation,
Respondent.
No. 631

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JAMES A. WILLIAMS
JEROME WILLIAMS
1121 Paulsen Building
Spokane 1, Washington
Counsel for Respondent.

NATIONAL PRINTING CO., SPOKANE 60117

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TABLE OF CASES

Page

Bell vs. Hood, 327 U. S. 678, 90 L. ed. 939 5

Gully vs. First National Bank, 299 U. S. 109, 81 L. ed. 70 ..... 4, 6

Norton vs. Whiteside, 239 U. S. 144, 60 L. ed. 186 ..... 5, 6

Penn. R.R. Co. vs. Puritan Coal Co., 237 U. S. 121, 59 L. ed. 867 ..... 7, 8

Penn. R.R. Co. vs. Sonman Coal Co., 242 U. S. 120, 61 L. ed. 188 ..... 7, 8

Shulthis vs. McDougal, 225 U. S. 561, 56 L. ed. 1205 5

South Covington Ry. Co. vs. Newport, 259 U. S. 97, 66 L. ed. 842 ..... 5, 6

Western Union vs. Ann Arbor Ry., 178 U. S. 239, 44 L. ed. 1052 ..... 5, 6

STATUTES

49 U.S.C. Sec. 9 8

49 U.S.C. Sec. 22 7

49 U.S.C. Sec. 908 (b.) & (c.) 9

49 U.S.C. Sec. 317 (b.) 7

TEXTS

Restatement of Torts, Sec. 710 6

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To The Honorable, The Chief Justice and The Associate Justices of the Supreme Court of the United States:

Respondent submits that a review of this case on certiorari is not warranted as none of the considerations outlined in Rule 19 of this Court exist here. In consequence, it is our position that the petition should be denied and respondent spared any additional expense in defending this claim.

The motion to dismiss petitioner's complaint in the Oregon District Court was made on the basis that the

complaint did not show on its face that there was a substantial federal question at issue. It was on that basis that the District Court dismissed the action, and on that basis also that the Court of Appeals affirmed, although the opinion of the Court of Appeals went somewhat further in answering and disposing of the various contentions made by the petitioner before that Court. The effect of the decision of the Court of Appeals, arrived at by application of well settled holdings of this Court, is simply to deny the jurisdiction of the *federal* courts, and leaves petitioner free to pursue such rights as it may have in the appropriate state court.

Petitioner's complaint in the District Court contained only the following substance (Transcript of Record, pp. 3-6):

PARAGRAPH I. Plaintiff and defendant are both Washington corporations.

PARAGRAPH II. Plaintiff and defendant are both common carriers of property by motor vehicle in interstate commerce, subject generally to the jurisdiction of the Interstate Commerce Commission.

PARAGRAPH III. "That this action is brought and the jurisdiction of this Court is invoked under the general laws and rules relative to actions at law arising under the Constitution and laws of the United States, and particularly under the Interstate Commerce Act, as amended, which Act is an Act of Congress regulating commerce within the meaning of

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the Act of June 25, 1948 c. 646, 62 Stat., 931, 28 U.S.C.A. §1337, providing as follows: 'The District Courts shall have original jurisdiction of any civil action or proceeding arising under any act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies.' "

PARAGRAPH IV. That plaintiff is and has been engaged in transportation of property in interstate commerce over U. S. Highway No. 30, between Boise, Idaho and Pendleton, Oregon, pursuant to Certificates of Public Convenience and Necessity issued to it by the Interstate Commerce Commission.

PARAGRAPH V. That defendant is and has been transporting property for compensation in interstate commerce over the same highway and between the same points, and that defendant has never held a Certificate of Public Convenience and Necessity to operate over such highway.

PARAGRAPH VI. The said operations of defendant are competitive with the licensed operations of the plaintiff and have wrongfully diverted traffic and revenues from the plaintiff.

PARAGRAPH VII. That plaintiff does not know the amount of revenues so diverted from it, but expects to determine this through use of the discovery procedures.

PRAYER. A demand for judgment against defendant "in such amount as may appear to be just

and reasonable as damages in the light of the evidence to be adduced in this proceeding."

No novel question is involved in the determination that the foregoing complaint does not disclose upon its face any substantial federal question at issue, nor is there any conflict between any of the Courts of Appeals on the subject. It has been uniformly held throughout the years by this Court that an action is not one "arising" under the Constitution, or laws of the United States or under the laws regulating commerce, so as to give Federal Courts jurisdiction in non-diversity cases, unless the action involves a real controversy between plaintiff and defendant concerning the validity, construction or effect of some such federal law or constitutional provision.

In *Gully vs. First Nat'l Bank*, 299 U. S. 109, 81 L. ed. 70, speaking through Justice Cardozo, this Court said:

> "How and when a case arises 'under the Constitution or Laws of the United States' has been much considered in the books. Some tests are well-established. To bring a case within the statute, a right or immunity created by the Constitution or Laws of the United States must be an element, and an essential one, of the plaintiff's cause of action (citing cases). The right or immunity must be such that it will be supported if the Constitution or Laws of the United States are given one construction or effect, and defeated if they receive another (citing cases). A genuine and honest controversy, not merely a possible or conjectural one, must exist with reference thereto (citing cases), and the controversy must be disclosed upon the face of the complaint, un-

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aided by the answer or by the petition for removal."

In *Shulthis vs. McDougal,* 225 U. S. 561, 56 L. ed. 1205, the Court said:

> "A suit to enforce a right which takes its origin in the laws of the United States is not necessarily, or for that reason alone, one arising under those laws, for a suit does not so arise unless it really and substantially involves a dispute or controversy respecting the validity, construction or effect of such a law, upon the determination of which the result depends."

Other cases so holding are:

Norton vs. Whiteside, 239 U. S. 144, 60 L. ed. 186;

Western Union vs. Ann Arbor Ry., 178 U. S. 239, 44 L. ed. 1052;

South Covington Ry. Co. vs. Newport, 259 U. S. 97, 66 L. ed. 842;

Bell vs. Hood, 327 U. S. 678, 90 L. ed. 939.

The last-cited case of *Bell vs. Hood,* which is so heavily relied upon in appellant's brief, clearly reiterated this fundamental test, where the Court said:

> "Thus, the right of the petitioners to recover under their complaint will be sustained if the Constitution and Laws of the United States are given one construction and will be defeated if they are given another. For this reason the District Court has jurisdiction."

Another clearly established principle is that the existence of such a controversy between plaintiff and defendant concerning the validity, construction or effect of a Federal law must appear affirmatively from

the complaint alone, by distinct factual pleadings therein.

Gully vs. First National Bank, 299 U. S. 109, 81 L. ed. 70;
Norton vs. Whiteside, 239 U. S. 144, 60 L. ed. 186;
South Covington Ry. Co. vs. Newport, 259 U. S. 97, 66 L. ed. 842;
Western Union vs. Ann Arbor Ry., 178 U. S. 239, 44 L. ed. 1052.

Tested by the foregoing principles, it seems apparent that petitioner's complaint fails to state any basis for Federal jurisdiction. There is no allegation in the complaint that the respondent claimed any right from the Interstate Commerce Commission to traverse U. S. Highway No. 30 which might make it necessary for the Court to interpret the Motor Carrier Act. For all that appears, respondent was a complete interloper.

There is no allegation in the complaint that petitioner claims a right of action by virtue of any Act of Congress; on the contrary, petitioner has relied throughout on what it deems is its common law right by virtue of a proposition stated in Section 710 of the Restatement of Torts (See Court of Appeals Transcript of Record, pp. 7-13).

Although petitioner in its complaint and in the District Court claimed no federal right of action by virtue of any Act of Congress, it did before the Court of Appeals and now does before this Court claim that an area of *federal* jurisdiction over a suit of this char-

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acter is created by the provisions of the Interstate Commerce Act as interpreted by this Court in the cases of *Penn. R.R. Co. vs. Sonman Coal Co.*, 242 U. S. 120, 61 L. ed. 188, and *Penn. R.R. Co. vs. Puritan Coal Co.*, 237 U. S. 121, 59 L. ed. 867 (Petition pp. 10-15). The fallacy of the reasoning by which petitioner arrives at this incorrect conclusion will undoubtedly be readily apparent to this Court.

Petitioner relies on a small portion of Section 22 of Part I of the Interstate Commerce Act (49 U.S.C. Sec. 22), which provides, "nothing in this Act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies." The Motor Carrier Act, Part II of the Interstate Commerce Act, incorporated the whole of Section 22 of Part I by reference (49 U.S.C. Sec. 317 (b.)), but it should be observed, as the Court of Appeals clearly pointed out, that Section 22 principally and at great length details various kinds of restrictions which may not be imposed on the operational activities and rates of rail carriers. To contend that the above-quoted language buried in Section 22 created a new area of federal jurisdiction and granted new rights to sue in federal courts involves legal interpretation beyond our comprehension.

As before stated, petitioner, in arriving at this illogical result, relies on statements in the *Sonman Coal Co.* and *Puritan Coal Co.* cases to the effect that actions against interstate carriers for violations of the

Interstate Commerce Act could be prosecuted in either federal or state courts. In both of those cases, this Court only held that such suits might be prosecuted in state courts by virtue of the above-quoted portion of Section 22. Petitioner reads into those cases a delineation by this Court of a new area of federal jurisdiction; but what petitioner completely overlooks is that the federal courts already had an express congressional grant of jurisdiction over such suits against railroads by Section 9 of Part I of the Interstate Commerce Act (49 U.S.C. §9), where it provided,

> "Any person or persons claiming to be damaged by any common carrier subject to the provisions of this chapter may either make complaint to the Commission as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this chapter, *in any district court of the United States of competent jurisdiction* * * *" (Italics ours).

In other words, the federal courts expressly had jurisdiction of the actions involved in the *Sonman Coal Co.* and *Puritan Coal Co.* cases, and the language of this Court to the effect that such claims might be enforced "in either a federal or a state court" meant only that such claims could additionally be entertained in state courts.

Congress, in passing the Motor Carrier Act in 1935, did not provide for the recovery of damages for violations of the Act, as had theretofore been specifically provided as to railroads by Section 8 of Part I of the Act. Nor did Congress in the Motor Carrier Act grant

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any jurisdiction to district courts of the United States as to any actions arising under the Motor Carrier Act, as was specifically done as to railroads by Section 9 of Part I of the Act. Certain sections of Part I of the Act were incorporated into the Motor Carrier Act by direct reference, but Sections 8 & 9 of Part I are not among these. It is also most noteworthy that in 1940 Congress passed the Water Carrier Act as Part III of the Interstate Commerce Act and embodied therein as Section 308 (b.) & (c.) substantially the same language as Sections 8 & 9 of Part I of the Act, thereby specifically authorizing suits for damages in federal courts against water carriers who violated the Act (49 U.S.C. 908 (b.) & (c.)). Seemingly of controlling significance is the omission of any such provisions in the Motor Carrier Act in view of its intermediate enactment.

Since no cause of action such as stated by petitioner in its complaint was created by the Motor Carrier Act, petitioner's right, if it has any, is a common law right. Furthermore, no express grant of federal jurisdiction exists as to this type of action and, in consequence, federal jurisdiction could only exist in this non-diversity case if, upon the face of the complaint, it appeared that there was a substantial federal question to be determined in the litigation; and there is no such showing on the face of the complaint here. All of the foregoing conclusions were reached by the courts below simply by the application of well-settled principles.

CONCLUSION

On the basis that there is no new and important question of federal law to be settled in this case, that the decision of the Court of Appeals is not in conflict with any decision of this Court, and that the decision of the Court of Appeals is not in conflict with the decision of any other Court of Appeals, we urge that the petition for writ of certiorari be denied.

Respectfully submitted,

JAMES A. WILLIAMS
JEROME WILLIAMS
1121 Paulsen Building
Spokane 1, Washington
Counsel for Respondent.

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